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No. 84-453

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IN THE SUPREME COURT

Of The

UNITED STATES

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

WALTER McCOVEY, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

QUESTION PRESENTED 1

OPINIONS BELOW 1

APPLICABLE LAWS 1

STATEMENT OF THE CASE 2

ARGUMENT 12

INTRODUCTION 12

I. THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND WAIVER PRECLUDE PETITIONER FROM CHALLENGING THE EXISTENCE OF RESPONDENT'S FEDERALLY-RESERVED RIGHT TO FISH IN THE KLAMATH RIVER WITH IN THE BOUNDARIES OF THE HOOPA VALLEY INDIAN RESERVATION 13

A. Res Judicata 13

B. Collateral Estoppel 16

C. Waiver 18

II. THE "EQUAL FOOTING DOCTRINE" DOES NOT GIVE CALIFORNIA POWER TO REGULATE INDIAN FISHING WITHIN THE BOUNDARIES OF THE HOOPA VALLEY RESERVATION. .. 19

III. THE CIRCUMSTANCES SURROUINDING THE CREATION OF THE RESERVATION INDICATE THAT THE RESERVATION INCLUDES THE KLAMATH RIVER. 22

IV. CALIFORNIA HAS NEITHER THE RIGHT NOR ANY REASON TO REGULATE AND/OR PROHIBIT OFF-RESERVATION SALES OF FISH BY INDIAN FISHERS. 24

V. P.L. 83-280 DOES NOT AUTHORIZE CALIFORNIA TO PROHIBIT INDIANS OF THE HOOPA VALLEY RESERVATION FROM SELLING FISH CAUGHT IN RESERVATION WATERS. .. 31

CONCLUSION 33

APPENDIX

TABLE OF AUTHORITIES

PAGE

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 21

Albertson v. Raboff, 46 Cal. 2d 375 (1956) 18

Allen v. McCurry, 449 U.S. 90 (1980) 14

Arizona v. California, 373 U.S. 546 (1963)
decree entered, 376 U.S. 340 (1964)
modified, 439 U.S. 419 (1979), further
modified, ___ U.S. ___, 75 L.Ed 2d 318 (1983) 21,23

Arnett v. 5 Gill Nets, 48 C.A. 3d 454 (1974)
cert. den., 425 U.S. 907 ..... Passim

Barona Group of Capitan Grande Band of
Mission Indians v. Duffy, 694 F.2d 1185
(9th Cir., 1982), cert. den. ___ U.S. ___,
103 S. Ct. 2091 31

Bernhard v. Bank of America, 19 C. 2d 807 (1942) 14,17

Blake v. Arnett, 663 F. 2d 906 (9th Cir., 1981) 16,22,33

Bryan v. Itasca County, 426 U.S. 373 (1976) 31

Buck v. Superior Court, 245 C.A. 2d 431 (1966) 8

Camfield v. United States, 167 U.S. 518 (1897) 20

Cory v. Campbell, 145 C.A. 3d 1044 (1st D.C.A. 1982), cert. den.,
459 U.S. 828 31

De Angeles v. Roos Bros., Inc., 244 C.A. 2d 434
52 C. Rptr. 783,790 (1st D.C.A., 1966) 18

De Coteau v. District County Court, 420 U.S. 425 (19175) ... 10

Department of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 45
(1973) 24,30

Donahue v. Justice Court, 15 C.A. 3d 557 (1971) 16

Donnelly v. United States, 228 U.S. 708 (1912) 3,22,23

Elser v. Gill Net No. 1, 246 C.A. 2d 30 (1966) 16

Harrison v. Perea, 168 U.S. 311 (1897) 19

Hughes v. Oklahoma, 441 U.S. 322 (1980) 19

Kleppe v. New Mexico, 426 U.S. 529 (1976) 20

Mattz v. Arnett, 412 U.S. 481 (1973) 3,10,11,16,17,23

McGoldrick v. Compagnie Gen. Transatlantique, 309 U.S. 430 (1939) 18

Menominee Tribe v. United States, 391 U.S. 404 (1968) 21

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1974) 25,26,29

Minnesota v. Block, 660 F.2d 1240 (8th Cir., 1981), cert., den., 455 U.S. 1007 20,21

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 25

Morton v. Mancari, 417 U.S. 535 (1974) 20

New England Power Co., v. New Hampshire, 455 U.S 331 (1982) 21

New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 76 L.Ed 2d 611 (1983) 24,25,27

Pacific Coast Federation of Fishermen's Ass'n. v. Secretary of Commerce, 494 F. Supp. 626 (N.D. Cal., 1980) .. 23

Pacific Mutual Life Ins. Co., of California v. McConnell, 44 C.2d 715 (1955) 14,17

People v. McKee, 267 C.A. 2d 509 (1969) 8

People v. McCovey, 36 C. 3d 51 ..... Passim

People v. Taylor, 250 C.A. 2d 367 (1967) 8

Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 27

Rosebud Sioux Tribe v. Kneip, 430 U.S. 351 (1977) 11

Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (1975), cert. den., 429 U.S. 1038 31

Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (11th Cir., 1981), cert. den., 455 U.S. 1020 .. 31

Seymour v. Superintendent, 368 U.S. 351 (1962) 11

Short v. United States, 486 F.2d 561 (Ct. Cl., 1973) 3

Sohappy v. Smith, 302 F. Supp. 899 (D. Ore., 1969), aff'd., 529 F.2d 570 (9th Cir., 1976) 29

United States v. Brown, 552 F.2d 817 (8th cir., 1977), cert. den., 431 U.S. 949 20,21

United States v. County of Humboldt, 615 F.2d 1260 (9th Cir., 1980) 31

United States v. Farris, 624 F.2d 890 (9th Cir., 1980), cert. den., 449 U.S. 1111 31

United States v. Hells Canyon Guide Service, Inc., 660 F.2d 735 (9th Cir., 1981) 21

United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865) 20

United States v. Kagama, 117 U.S. 375 (1886) 22

United States v. Lindsey, 595 F.2d 5 (9th Cir., 1979) ... 20,21

United States v. Marcyes, 557 F.2d 1361 (1977) 31

United States v. Michigan, 653 F.2d 177 (6th Cir., 1981) ... 29

United States v. North Dakota, 650 F.2d 911 (8th Cir., 1981), affirmed, 458 U.S. 1129 (1983), affirmed, 458 U.S. 1129 (1983) 21

United States v. San Francisco, 310 U.S. 16 (1940) 20

Vanguard Recording Society v. Fantasy Records, Inc., 24 C.A. 3d 410 (1st D.C.A., 1972) 17

Warren Trading Post v. Ariz. State Tax Comm'n., 380 U.S (1965) 27

Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) 25

Washington v. Fishing Vessel Ass'n., 443 U.S 658 (1979). 21,24,29

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 27

Zalk v. General Exploration Co., 105 C.A. 3d 786 (1980) 18

STATUTES, CONSTITUTIONAL PROVISIONS, REGULATIONS AND COURT RULES

U.S. Constitution

Art. I, §8, Cl. 3.....19

Art. IV, §3, Cl. 2.....20

Art. VI, Cl. 2.....21

United States Code (Annotated)

18 U.S.C. §1151.....3

18 U.S.C. §1162, 28 U.S.C. §1360 (P.L. 83-280).....31

Regulations

25 C.F.R. Part 11.....4

25 C.F.R. Part 250.....5,27,28

25 C.F.R. Part 258.....4

42 Fed. Reg. 40904-5 (Aug. 12, 1977).....3,4,11,27

42 Fed. Reg. 47555 (Sept. 21, 1977).....4

43 Fed. Reg. 30047-53 (July, 12, 1978).....4,11,27

44 Fed. Reg. 17144-17151 (Mar. 20, 1979).....5,12,27

46 Fed. Reg. 56057-8 (Nov. 13, 1981).....5

47 Fed. Reg. 32844, et seq., (July 29, 1982).....5

Court Rules

Supreme Court Rule 21.5.....12

State

Fish and Game Code

§2002.....6,7,13

§7155.....27

§7850-52.....28

§7852.5.....28

§§8230-8239.....28

§8434.....27,28,30

§8685.5.....27

§8685.6.....6,8,29,30

§12000-12020.....28

Penal Code

§182.....6,7,13

§999a.....8

§1238.....14

Other Statutes, Resolutions

Senate Joint Resolution No. 35, Res. Chapt. 46, June 1, 1982.....30

QUESTION PRESENTED

The only question properly before the Court is as follows:

Is California's absolute, permanent ban on the off-Reservation sale of fish caught in the Klamath River by Indians of the Hoopa Valley Reservation preempted by, inter alia, the regulations adopted by the Secretary of the Interior to govern the exercise of the fishing rights reserved to the Indians of the Reservation by the federal statutes and Executive Orders by which the Reservation was created?

OPINIONS BELOW

The decision of the Supreme Court of California is reported at 36 Cal. 3d 517 and 205 Cal. Rptr. 643. The decision of the Court of Appeal is reported at 145 C.A. 3d 190 and 193 Cal. Rptr. 293. The decision of the Superior Court for the County of Santa Clara is unreported, but is set forth at pp. A1-4 of the Appendix hereto.

APPLICABLE LAWS

In addition to the federal laws set forth in the Petition, Respondent contends that the following laws and regulations, the texts of which are set forth at pages A5-16 of the Appendix hereto, are applicable:

1. Act of March 3, 1853, 10 Stat. 238.
2. Act of March 3, 1855, 10 Stat. 699.

3. 25 C.F.R. Part 250 (1982).

STATEMENT OF THE CASE

Petitioner's Statement of the Case substantially misstates and distorts the evidence in the record and the proceedings below. Similar misrepresentations occurred in both the Court of Appeal and the California Supreme Court. On each occasion, Respondent McCovey brought those misrepresentations to the attention of the court and counsel.

Petitioner's "Supplemental Brief" reluctantly discloses several deliberate previous omissions; however, even with those disclosures, Petitioner's description of this case remains misleadingly inaccurate and incomplete. Accordingly, Respondent hereby sets forth an accurate Statement of the Case.

1. Nature of the Controversy

The Hoopa Valley Indian Reservation in Northwestern California consists of a tract of land extending for one mile on each side of the Klamath River from the Pacific Ocean to the confluence of the Klamath and Trinity Rivers about 50 miles upstream, at which point it widens into a twelve-mile square. The Reservation was created by Presidential Executive Orders in 1855, 1876 and 1891, pursuant to federal statutes enacted in 1853, 1855 and 1864. The history of the Reservation and the purposes for which it

was created were described and determined in, inter alia, Mattz v. Arnett, 412 U.S. 481 (1973); Arnett v. 5 Gill Nets, 48 C.A. 3d 454 (1974), cert. den., 425 U.S. 907; Donnelly v. United States, 228 U.S. 243, modified on den. of pet. for reh., 228 U.S. 708 (1913); and Short v. United States, 486 F. 2d 561 (Ct. Cl., 1973).

In Mattz v. Arnett, supra, this Court held that the former Klamath River Reservation (the portion of the Reservation between the Pacific Ocean and a point 20 miles upstream) remains "Indian country" as defined in 18 U.S.C §1151. On remand, the California Court of Appeal determined in Arnett v. 5 Gill Nets, supra, that the federal statutes and Executive Orders under which the Reservation had been created reserved to the Indians thereof a federally-protected right to fish in the Klamath River, and thus that application of the State Fish and Game Code to Indians fishing in the Klamath River and other Reservation waters was precluded by force of the Supremacy Clause, U.S. Const. Art. VI Cl.2. Arnett v. 5 Gill Nets, supra, at 461.

In 1977, the Secretary of the Interior promulgated interim regulations to govern Indian fishing on the Hoopa Valley Reservation until such time as a Reservation-wide Tribal government could regulate the Indian fishery. Those regulations specifically allowed the use of gill nets, and authorized Indian fishers to catch up to five anadromous fish per day for purposes of sale. 25 C.F.R. §258.5, 42

F.R. 40904-5, as corrected at 42 F.R. 47555. In those and other respects, the regulations authorized conduct which otherwise would have violated the California Fish and Game Code and regulations made thereunder.

In 1978, the Secretary of the Interior (hereinafter "the Secretary") adopted a much more comprehensive set of regulations. Those regulations established eligibility criteria for Indian fishers and a system of identifying fishers and fishing gear; limited fishing time, places and permissible fishing methods; and established a Court of Indian Offenses under 25 C.F.R. Part 11 to punish Indians who violate the regulations. 25 C.F.R. Part 258 (1978).

The Secretary's 1978 regulations explicitly permitted the sale of fish both on and off-Reservation. The regulations required that an on-Reservation fish buyer possess or have applied for an Indian trader's license; no restriction was imposed upon off-Reservation sales, other than that the Indian seller had to record such sales and report them to the U.S. Fish and Wildlife Service on a weekly basis. 25 C.F.R. §258.13, 43 F.R. 30047-53, July 13, 1978.

The 1978 fall Chinook salmon run was smaller than had been anticipated, due to a severe drought. In response, the Secretary's representative imposed a temporary moratorium on fish sales. That moratorium was incorporated in the revised regulations adopted by the Secretary in 1979, 44 F.R. 17144-

51, March 20, 1979, and has remained in effect ever since, pending completion of an Environmental Impact Statement on Indian commercial fishing. See, e.g., 46 F.R. 56057-8, November 13, 1981.

The remainder of the Secretary's Hoopa Valley Indian fishing regulations, recodified in 1982 at 25 C.F.R. Part 250, have evolved into an elaborate, comprehensive and rigorous scheme for limiting and monitoring the impact of the Indian fishery on the salmon and other fish resources of the Klamath River and its tributaries within the boundaries of the Hoopa Valley Reservation. The regulations govern Indian possession and disposition of Reservation-caught fish even beyond Reservation boundaries. 47 F.R. 32844 et seq., July 29, 1982.

Respondent, Walter McCovey, Jr., is a Yurok Indian of the Hoopa Valley Reservation. At all times relevant hereto, Mr. McCovey was (and remains) the holder of a Hoopa Valley Reservation Fisher's Identification Card issued by the United States Department of the Interior, Bureau of Indian Affairs, pursuant to 25 C.F.R. §§250.5 and 250.6.

In September, 1980, Mr. McCovey was arrested along with a co-defendant, Lance Wilkie, in San Jose, California by California authorities who, through undercover intermediaries, had arranged to purchase from Mr. McCovey approximately 100 Chinook salmon which he had caught in the Klamath River using a gill net. The fish and the proceeds

of the sale were confiscated and Mr. McCovey was charged with violating California Fish and Game (hereinafter "F. & G.") Code §§8685.6 (felony sale or possession for sale of salmon, steelhead or striped bass caught in California waters by means of a gill net) and 2002 (misdemeanor possession of fish taken in violation of any provision of the F. & G. Code, or of any regulation made thereunder), and California Penal Code §182 (felony conspiracy to violate F. & G. Code §2002).

Mr. McCovey moved to dismiss the information. The motion was based on the grounds that enforcement of restrictions on the possession and/or disposition of fish caught by Reservation Indians in Reservation waters impermissibly infringes upon and is preempted by Respondent's federally-reserved fishing rights as an Indian of the Hoopa Valley Reservation, and the Hoopa Valley Reservation Indian fishing regulations adopted by the Secretary of the Interior.

In response to the motion to dismiss, Petitioner conceded that the fish were caught in the Klamath River within the boundaries of the Reservation, and that Respondent McCovey, as an Indian of the Reservation, has a federally-reserved right to fish in the Klamath River and even to sell such fish within the boundaries of the Reservation free of State regulation:

> Counsel [for defendants] in their Points and Authorities argue strenuously that the fish herein

> were caught on the Hoopa Valley Indian Reservation -- and the People agree. Mattz v. Arnett (1973) 412 U.S. 481 clearly states that the Hoopa Valley Indian Reservation begins at the Pacific Ocean and continues along the Klamath River until the confluence of the Klamath and Trinity Rivers.
>
> The defendants next argue that they have a federally protected right to fish by gill nets from the Klamath River and sell the same to sustain themselves. The People similarly agree that the defendants' right to fish in this manner in the reservation is controlled federally and California may not infringe thereon. [Emph. added]. [C.T. p. 103, l. 1-11].

The trial court independently reached the same conclusion:

> It is equally clear, however, that Yurok Indians have the right, under federal law, to catch fish in this manner on their reservation, and the prosecution does not contend to the contrary. Mattz v. Arnett, (1973) 412 U.S. 481; Arnett v. Five Gill Nets (1975) 48 Cal. App. 3d 454). [C.T.p. 142, l. 13-17].

On that ground the Superior Court dismissed the charges of violation of F. & G. Code §2002 and Pen. Code §182. C.T. p. 143. Petitioner did not appeal from that order, and the trial court's decision on that issue now is final.

While the Superior Court held that Petitioner could not regulate either Respondent's taking of fish in the Klamath River or the off-Reservation possession of such fish, it accepted Petitioner's contention that the Indians of the Reservation do not have a federally-reserved right to sell Reservation-caught salmon beyond Reservation boundaries. [C.T. p. 144]. Thus, the trial court denied Respondent's motion to dismiss Count 1 of the Information [C.T. p. 144],

and convicted Respondent and his co-defendant of violating F. & G. Code §8685.6. [C.T. p. 147].

Respondent was sentenced to a suspended term in State prison, three years of formal probation, 90 days in the County Jail and a fine of $2,500 (plus a penalty assessment). [C.T. p. 152].

Respondent and his co-defendant appealed their conviction. The Court of Appeal consolidated their case with seven other cases involving essentially the same legal issues. On appeal, Petitioner raised for the first time the questions whether the Klamath River is within the boundaries of the Hoopa Valley Reservation, and whether the Indians of the Reservation have a federally-protected right to fish in the Klamath River. Petitioner also requested leave to put into the record numerous exhibits, and affidavits of potential witnesses.

The Court of Appeal specifically denied Petitioner's evidentiary requests. See Order of May 4, 1983, included in the Appendix at p. A20. One reason for that denial might have been that Calif. Penal Code §999a limits the court reviewing the denial of a motion to set aside an information to the record which was before the committing magistrate. Buck v. Superior Court, 245 C.A. 2d 431 (1966); People v. McKee, 267 C.A. 2d 509 (1969); People v. Taylor, 250 C.A. 2d 367 (1967).

The Court of Appeal affirmed Respondent's conviction on the ground that the Secretary of the Interior's Hoopa Valley Reservation Indian fishing regulations had extinguished any right which the Indians of the Reservation otherwise might have had to sell fish caught in Reservation waters. In separate decisions, the Court of Appeal denied the pretrial relief sought in the other consolidated cases.

Petitions for hearing were filed in the California Supreme Court in this case and the other cases which had been consolidated in the Court of Appeal. Those petitions were granted. After hearing argument only in McCovey and Wilkie, the California Supreme Court reversed Respondent's conviction on the ground that the creation of the Hoopa Valley Reservation by Executive Orders issued pursuant to Acts of Congress had reserved to the Indians thereof the right to fish in the Klamath River, and thus that State regulation of any aspect of that activity -- including off-Reservation sales -- has been preempted by the comprehensive Hoopa Valley Indian fishing regulations duly promulgated by the Secretary of the Interior.

Petitioner and Mr. Wilkie both filed petitions for rehearing; both were denied. The other cases with which this case had been consolidated in the Court of Appeal were transferred to the Court of Appeal for further consideration in light of People v. McCovey.

The Petition contains several additional misstatements, inaccuracies and allegations unsupported by any evidence of record. Petitioner's descriptions of State and federal regulatory efforts are not supported by the evidence in the record, and in large measure simply are untrue. Indeed, had Petitioner utilized the opportunity to raise these issues in the trial court, the evidence would have shown that destruction of salmon habitat by dams, mining, logging and roadbuilding are the major causes of much of the original decline in the Klamath River basin's once-abundant salmon resources.

The evidence would have shown that the recovery of the Klamath's salmon resources to the level of abundance which the remaining habitat can support has been prevented in large measure by Petitioner's encouragement or toleration of excessive and needlessly destructive ocean harvests of salmon destined for the Klamath, and its failure to adequately protect against further habitat despoliation. Finally, the evidence would have shown that the Indian net fishery on the Klamath River accounts for only a small percentage of the total annual harvest of Klamath River Chinook salmon.

Next, the Petition asserts (p. 4, n.2) that Mattz v. Arnett, 412 U.S. 481 (1973), "recently [was] declared to be of doubtful validity." In fact, in De Coteau v. District County Court, 420 U.S. 425 (1975), the Supreme Court stated

as to Mattz v. Arnett, supra, and Seymour v. Superintendent, 368 U.S. 351 (1962),

> "We adhere without qualification to both the holdings and the reasoning of those decisions." 420 U.S. at 447.

See also, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 585-87 (1977).

Finally, the Petition refers to a purported memorandum from the office of the Solicitor of the Department of the Interior allegedly authorizing assistance to State officials in prosecutions for violating State fishing laws. That document was never admitted into evidence; indeed, Petitioner's request to include it in the record was specifically denied by the Court of Appeal.

Moreover, the unauthenticated document (the copy included in the Appendix is not accurate) was not authored by the Interior Solicitor, did not issue from the division of the Solicitor's office responsible for interpreting and protecting Indian fishing rights, and does not even purport to offer assistance in prosecutions of Indians for selling salmon caught in Reservation waters (the Klamath River extends far upstream of the Reservation).

In fact, the official position of the Secretary of the Interior was and is that the Indians of the Reservation have a federally-reserved right to sell fish caught in Reservation waters. 42 F.R. 40905; 43 F.R. 30048. In the

preamble to the Secretary's 1979 Hoopa Valley Reservation Indian fishing regulations, the Secretary explicitly stated that:

> "It is recognized that the right to fish commercially does exist and may be exercised at such time in the future when the fish runs can withstand the increased harvest. These rights will not be modified or extinguished by these regulations. [Emphasis added]. (44 F.R. at 17146.)"

The Secretary's above statement reiterates the position of the United States in the Memorandum filed by the Solicitor General in opposition to the petition for certiorari in Arnett v. 5 Gill Nets, No. 75-527.

ARGUMENT

INTRODUCTION

In the foregoing response to Petitioner's Statement of the Case, Respondent demonstrated that the Petition is so rife with deliberate omissions, mischaracterizations and outright misstatements of the fundamental facts and issues in this case as to warrant denial pursuant to Supreme Court Rule 21.5.

The Argument which follows explains why the doctrines of res judicata, collateral estoppel and waiver, and the California Supreme Court's adherence to this Court's principles of federal preemption of State jurisdiction over Indian rights and conduct also warrant denial of the Petition.

I. THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND WAIVER PRECLUDE PETITIONER FROM CHALLENGING

THE EXISTENCE OF RESPONDENT'S FEDERALLY-RESERVED RIGHT TO FISH IN THE KLAMATH RIVER WITHIN THE BOUNDARIES OF THE HOOPA VALLEY INDIAN RESERVATION.

A. Res Judicata

In the trial court, Respondent moved to dismiss the information. The motion rested on the grounds that the creation of the Hoopa Valley Reservation by Executive Orders issued pursuant to Acts of Congress reserved to the Indians thereof the right to fish in the Klamath River free of State regulation, and that the Secretary's Hoopa Valley Indian fishing regulations preempt whatever authority Petitioner otherwise might have to prohibit off-Reservation sale of fish caught in Reservation waters.

In its "Supplemental Brief," Petitioner belatedly and grudgingly admits that it affirmatively conceded Respondent's claim that he has a federally-reserved and regulated right to fish in the Klamath River and even to sell fish on the Reservation, and that Petitioner may not regulate the on-Reservation exercise of that right.

In its ruling on the motion to dismiss the Information, the trial court agreed that Respondent has a federally-reserved and regulated right to fish in the Klamath River free of State regulation. Thus, Petitioner was precluded from prosecuting Respondent for violating F. & G. Code §2002 and Calif. Penal Code §182. C.T. p. 141.

Under Calif. Penal Code §1238, Petitioner had the right to appeal from the order dismissing thess Counts. However, Petitioner did not appeal, and that order now is final.

Notwithstanding its own trial court concessions and the judgment of the trial court, Petitioner now contends that Respondent has no federally-reserved right to fish in the Klamath River, because, inter alia, the river is not within the boundaries of the Reservation.

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Allen v. McCurry, 449 U.S. 90 (1980); Bernhard v. Bank of America, 19 Cal. 2d 807 (1942); Pacific Mutual Life Ins. Co. of Calif. v. McConnell, 44 C.A. 2d 715 (1955).

The question whether the creation of the Hoopa Valley Reservation reserved to the Indians the right to fish in the Klamath River was squarely and unavoidably before the trial court in this case. The trial court could not have dismissed Counts Two and Three of the Information unless the court determined that the fish, which were from the Klamath River, had been caught within the boundaries of the Reservation in the exercise of Respondent's federally-reserved fishing right.

The trial court's judgment necessarily decided the same basic question which Petitioner seeks to raise before this Court in the Petition, and did so adversely to Petitioner. That judgment was not appealed, and became final before this case was considered by the Court of Appeal. Thus, all of the elements necessary for a finding of res judicata are present.

Petitioner has attempted to avoid the bar of res judicata by claiming (Pet., p. 8, n. 6) that the arguments which it chose not to present in the trial court are "jurisdictional," and thus "can clearly be raised at any stage of the proceeding." This contention is patently devoid of merit.

Petitioner is not challenging the California Supreme Court's subject-matter jurisdiction; rather, Petitioner is attacking the merits of the lower court's decision that Petitioner lacks regulatory jurisdiction over Respondent's exercise of his federally-reserved right to fish in the Klamath River.

The cases cited in the Petition do not support the proposition that Petitioner may repuduiate its prior concessions. All of those cases involved concessions or practices outside of judicial proceedings in which the specific right or power was at issue. There is no authority for the proposition that Petitioner is not bound by the

actions of its representatives in judicial proceedings. See, e.g., Elser v. Gill Net No. 1, 246 C.A. 2d 30, 31 (1966).

B. Collateral Estoppel

In several previous court cases initiated by and/or involving Petitioner or its authorized agents, Petitioner contended that the waters of the lower 20 miles of the Klamath River are not within the boundaries of the Hoopa Valley Reservation, that the creation of the Reservation did not create/reserve a federally-protected right to fish in the waters of the Klamath River, and that Petitioner may regulate Indian fishing in the Klamath River. See. e.g., Elser v. Gill Net No. 1 246 C.A. 2d 30 (1966); Donahue v. Justice Court 15 C.A. 3d 557 (1971); Arnett v. 5 Gill Nets, supra; see also, Mattz v. Arnett, supra; Blake v. Arnett 663 F. 2d 906 (9th Cir., 1981). In each of those cases, Petitioner had the opportunity to offer the same evidence and make the same legal arguments which it failed to make in the trial court in this case, and which it now seeks to make in the Petition.

In each of those cases, the court determined that the Indians of the Hoopa Valley Reservation have a federally-reserved right to fish in the Klamath River within the boundaries of the Hoopa Valley Reservation, and that Petitioner has no authority to regulate the exercise of that right.

Under California law, the doctrine of collateral estoppel precludes a party or one in privity with a party to an action from relitigating in a subsequent action any issue determined in the prior action, and every matter which might have been urged to sustain or defeat the prior determination. Pacific Mutual Life Ins. Co. of Calif. v. McConnell (1955) 44 C. 2d 715; Vanguard Recording Society v. Fantasy Records, Inc. (1972) 24 C.A. 3d 410; Bernhard v. Bank of America (1942).

Petitioner or its privies were parties to the prior cases.[1/] The prior cases explicitly or by necessary implication involved and finally determined adversely to Petitioner the question whether the creation of the Hoopa Valley Reservation reserved to the Indians thereof a federally-protected right to fish in the Klamath River.[2/]

Thus, all of the elements of collateral estoppel are present in this case, and Petitioner cannot now relitigate the existence of Respondent's fishing right by claiming that the lower courts improperly failed to consider its untimely and unsupported arguments.

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1 In Elser v. Gill Net No. 1, supra, the Court of Appeal rejected the Attorney General's similar attempt to repudiate trial court representation by the District Attorney.

2 In Mattz v. Arnett, the Court remanded the case for a determination of the fishing rights issue. The right was confirmed in Arnett v. 5 Gill Nets.

C. Waiver

Petitioner has had numerous opportunities to present to a trial court the principal factual and legal contentions which it now seeks to raise in the Petition. As conceded by Petitioner in its "Supplemental Brief," Petitioner consistently has chosen not to present those contentions in the trial court in this case, and as noted above, Petitioner did not appeal from the adverse ruling of the trial court.

Under California law, a party --any party-- who fails to appeal from a judgment may not thereafter advance a legal theory which would render that judgment erroneous. Zalk v. General Exploration Co., 105 C.A. 3d 786 (1980). Neither may a party transform an appellate court into a trial court by offering for the first time on appeal evidence or arguments which could have been presented to the trial court; that has been rightly condemned as, "playing fast and loose with the decisional process." De Angeles v. Roos Bros., Inc., 244 C.A. 2d 434 52 C. Rptr. 783, 790 (1966). See also, Albertson v. Raboff, 46 C. 2d 375 (1956).

The United States Supreme Court adheres to the same principle:

> "But it is the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. [Citation omitted.]" McGoldrick v. Compagnie Gen. Transatlantique, 309 U.S. 430, 434 (1939).

See also, Harrison v. Perea, 168 U.S. 311 (1897).

Petitioner seeks to present in its Petition the same basic issue which necessarily and finally was resolved against Petitioner in the unappealed portion of the trial court's judgment in this case and in several prior cases. Res judicata, collateral estoppel and waiver all preclude Petitioner from doing so. Thus, the Petition should be denied.

II. THE "EQUAL FOOTING DOCTRINE" DOES NOT GIVE CALIFORNIA POWER TO REGULATE INDIAN FISHING WITHIN THE BOUNDARIES OF THE HOOPA VALLEY RESERVATION.

Petitioner contends that the navigability of the Klamath River confers upon it jurisdiction to regulate the Indian use of the Klamath's fish resources within the Hoopa Valley Reservation. In so doing, it equates ownership of the riverbed with jurisdiction over a Reservation member's use of this natural resource. This is contrary to the massive body of case law which has recognized that the "equal footing" doctrine does not limit the federal government's authority to protect Indians, federal interests in property and natural resources.

Under Article I, §8, cl. 3 of the Constitution, Congress has plenary power not only over international and interstate commerce, including wildlife, see, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1980), but also over all aspects of Indian affairs. United States v. Kagama, 117 U.S. 375

(1886); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1865). Under Article IV, §3, cl. 2, the United States has similar authority over its property and wildlife, Kleppe v. New Mexico, 426 U.S. 529 (1976), even to the extent of reaching beyond the limits of federal lands, Camfield v. United States, 167 U.S. 518 (1897), and preempting state regulation of hunting and fishing in the navigable waters of a state. Minnesota v. Block, 660 F. 2d 1240 (8th Cir., 1981), cert. den., 455 U.S. 1007; United States v. Brown, 552 F. 2d 817 (8th Cir., 1977), cert. den., 431 U.S. 949.

The only significant constraint on the exercise of federal authority over Indian Affairs is that such exercise must "...be tied rationally to the fulfillment of Congress' unique obligation toward the Indians..." Morton v. Mancari, 417 U.S. 535, 555 (1974). The power of the United States under the Property Clause is similarly expansive; i.e., federal regulations must be "needful" prescriptions "respecting" federal property. United States v. San Francisco, 310 U.S. 16 (1940); United States v. Brown, supra; United States v. Lindsey, 595 F. 2d 5 (9th Cir., 1979).

The determinative question for jurisdictional purposes is not whether the federal reservation or regulation of a resource right occurred before or after statehood, but whether the federal action was necessary or justifiable in the fulfillment of a proper federal objective. If so, the

state's sovereign prerogatives -- even as to navigable waters or wildlife -- are subordinated to the exercise of federal authority under the Constitution's Supremacy Clause, Article VI, cl. 2. See; e.g., U.S. v. North Dakota, 650 F.2d 911 (8th Cir., 1981); affirmed, 458 U.S. 1129 (1983); Menominee Tribe v. United States, 391 U.S. 404 (1968).

As was held in Arizona v. California, 373 U.S. 546, 598 (1963), decree entered, 376 U.S. 340 (1964), modified, 439 U.S. 419 (1979), further modified, ___ U.S. ___, 75 L.Ed 2d 318 (1983),

> "We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."

Washington v. Fishing Vessels Ass'n., 443 U.S. 658 (1979), construed the federal power described in Arizona v. California, Id., and applied it to Indian fishing rights. See also, Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Minnesota v. Block, supra, (Wilderness); United States v. Brown, supra (National Park); United States v. Lindsey, supra, 595 F.2d 5 (National Forest, National Recreation Area, Wild and Scenic River); United States v. Hells Canyon Guide Service, Inc., 660 F.2d 735 (9th Cir., 1981) (National Forest, National Recreation Area, Wild and Scenic River); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (hydroelectricity).

Thus, the California Supreme Court followed well-settled principles of federal law when it summarily rejected

Petitioner's arguments about the navigability of the Klamath River, and there is no reason for this Court to consider the issue.

III. THE CIRCUMSTANCES SURROUNDING THE CREATION OF THE RESERVATION INDICATE THAT THE RESERVATION INCLUDES THE KLAMATH RIVER.

There can be no doubt that the primary purpose for which the United States established and enlarged what is now known as the Hoopa Valley Reservation was to protect the Indians from "their deadliest enemies" -- the non-Indian people of the State of California. See, e.g., United States v. Kagama, 118 U.S. 375, 384 (1886). A series of Executive orders authorized by Acts of Congress accomplished this purpose by setting aside a Reservation which would assure the continued availability of the fish and other resources of the Klamath River that were "not much less necessary to the existence of the Indians than the atmosphere that they breathed." Blake v. Arnett, supra, 663 F. 2d at 906.

As the Supreme Court observed in Donnelly v. United States, id., 228 U.S. at 259,

> "Indeed, in view of all of the circumstances, it would be absurd to treat the [Executive] order [establishing the Reservation] as intended to include the uplands to the width of 1 mile on each side of the river, and at the same time to exclude the river. As a matter of history, it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing."3/

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3 Although the Court withdrew the portion of its opinion that had determined that the river was non-navigable, the Court left intact its holding that the river was within the Reservation. 228 U.S. 1035.

See also, Mattz v. Arnett, supra; Arnett v. 5 Gill Nets, supra; Pacific Coast Federation of Fishermens Ass'n. v. Secretary of Commerce, 494 F.Supp. 626, 632-33 (1980).

Without the Klamath River and the reserved right to fish therein, the Hoopa Valley Reservation would have been and now would be just as useless as the Reservation lands along the California side of the Colorado River in Arizona v. California, supra, would have been without a reserved right to the water of that river.

In a succession of decisions, this Court, other federal courts and the courts of the State of California consistently have held that the Klamath River and fishing rights therein were and remain essential to fulfillment of the primary purposes for which the United States created the Hoopa Valley Reservation. This Court need not consider Petitioner's belated claim, unsupported by any evidence in the record, that the Klamath River's purported status as navigable waterway[4/] precluded the reservation of fishing rights in the river for the Indians of the Reservation.

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4 In Donnelly v. United States, supra, the Supreme Court specifically declined to take judicial notice of the purported navigability of the Klamath River. 228 U.S. at 709-710.

Moreover, the very documents from the Justice and Interior Departments upon which Petitioner's present contention is based were expressly considered by the Court in Mattz v. Arnett, 412 U.S. at 491-492, and on remand in Arnett v. 5 Gill Nets, supra. These documents obviously lack the significance Petitoner attaches to them.

IV. CALIFORNIA HAS NEITHER THE RIGHT NOR ANY REASON TO REGULATE AND/OR PROHIBIT OFF-RESERVATION SALES OF FISH BY INDIAN FISHERS.

There are at least three equally compelling reasons why this Court should not review the California Supreme Court's holding that federal law preempts Petitoner's authority to prohibit the off-Reservation sale of fish caught by Indians in Reservation waters.

A. Petitioner Actually Seeks to Regulate On-Reservation Conduct.

Petitioner's only legitimate interest in regulating the exercise ot federally-reserved fishing rights by Indians of the Hoopa Valley Reservation is to conserve the salmon resources of the Klamath River system. Petitioner's only legitimate objective in promoting that interest is to ensure that sufficient fish escape all forms of capture and return to their spawning grounds to reproduce. How, where, by whom and for what purposes fish are caught, and what is done with the fish after capture, are essentially irrelevant to a legitimate conservation interest. Dep't. of Game v. Puyallup Tribe (Puyallup II), 414 U.S. 45 (1973); Washington v. Fishing Vessels Ass'n., supra; Arnett v. 5 Fill Nets, supra; see also, New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 76 L. Ed 2d 611 (1983).

Precisely because it is the catching of fish, rather than their disposition, that impacts the resource, the

California Supreme Court correctly reasoned that the significant event, in terms of weighing the State's conservation interest, was the on-Reservation catching of the fish, rather than the off-Reservation sale. Accordingly, the Court properly correctly characterized the case as involving on-Reservation conduct, and analyzed the preemption issue accordingly. 36 C. 3d at 536.

Petitioner argues that an Indian who catches fish in Reservation waters may not transport or dispose of those fish beyond Reservation boundaries free of State regulation. That argument is contrary to the unappealed portion of the trial court judgment in this case. It is also contrary to this Court's decision in New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 76 L.3d 2d 611 (1983), which upheld the right of non-Indians possessing game lawfully caught on a Reservation to transport that game off-Reservation. See also, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); and Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), for analogous treatment of the off-Reservation use of Reservation-based commodities.

B. This case falls within the exceptions to the general rule of Mescalero Apache Tribe v. Jones.

While Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), stated the general rule that Indians going beyond Reservation boundaries are subject to the same laws as

everyone else, there are two crucial qualifications to that rule: 1) Indian immunity to State law is not lost if there is federal law to the contrary; and 2) Indians are subject only to non-discriminatory state laws. Both of these qualifications to the general rule apply in this case, although the California Supreme Court's finding of "federal law to the contrary" made consideration of the second qualification unnecessary.

Mescalero Apache Tribe v. Jones, Id., involved State taxation of the gross receipts of an off-Reservation ski resort that happened to be owned by an Indian Tribe. Although federal policies support Tribal economic development, the resort was not operated pursuant to a reserved Reservation resource right, and was not the subject of a specific and comprehensive regulatory scheme.

This case, on the other hand, involves the exercise of a federally-reserved fishing right that is essential to the fulfillment of the federal purposes for which the Reservation was created, Arnett v. 5 Gill Nets, supra, and is the subject of a specific, comprehensive and detailed federal regulatory scheme. 36 C. 3d at 529-530. The State Supreme Court correctly found that off-Reservation disposition of fish caught on the reservation could not be viewed as separate from the on-Reservation exercise of the right to fish.

The State Supreme Court exhaustively analyzed and compared the respective regulatory schemes of Petitioner and the Secretary. The Court found the federal scheme was so comprehensive as to extend even to the off-Reservation possession or sale of fish, and that the basic premises, objectives and enforcement mechanisms of the State and federal schemes are incompatible. 36 C.3d at 529-531. Thus, the Court correctly found federal preemption under, inter alia, Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832 (1982), Warren Trading Post v. Ariz. State Tax Comm'n., 380 U.S. 685 (1965), White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) and New Mexico v. Mescalero Apache Tribe, supra.

Petitioner and amici simply are wrong when they contend that there is no conflict between the federal and State regulatory schemes. The federal scheme is based on the premise that the Indians of the Reservation possess federally-reserved fishing rights, including the right to fish with nets and to sell fish. See, e.g., 42 Fed. Reg. 40904-5 (1977); 43 Fed. Reg. 30048 (1978); 44 Fed. Reg. 17144-51 (1979). Petitioner's laws are based on the premise that no such rights exist. See, e.g., F. & G. Code §§7155, 8434, 8685.5.

The principal intended beneficiaries of the federal scheme are the Indians of the Hoopa Valley Reservation. 25 C.F.R. §250.1(a) (1982). Petitioner's scheme is intended

to benefit primarily the existing non-Indian ocean commercial and the ocean and in-river sport fisheries. See, e.g., F. & G. Code §§7850-52, 7852.5, 8230-39, 8434.

The federal scheme is intended to temporarily regulate Indian fishing only until the Secretary deems a Tribal governing body capable of regulating Indian fishing and conserving the resource. 25 C.F.R. §250.1(a). One objective of the scheme is to encourage and assist the development of Tribal governmental institutions.

By contrast, Petitioner's scheme is permanent and absolute. Petitioner's scheme not only provides no role for Tribal government, but actually discourages development of Tribal institutions. 36 C. 3d at 531.

Finally, the federal scheme provides for penalties commensurate with the minimal impact which the Secretary has found the Indian Fishery has on the resource. Petitioner's scheme treats Indian fishers such as Respondent as felons. At the same time those non-Indian fishers who violate regulations much less intrusive than the absolute ban imposed on Indian commercial fishermen are subject to only minor misdemeanor sanctions. Id.; 25 C.F.R. §250.15(a); F. & G. Code §§12000-12020.

Thus, the California Supreme Court correctly concluded that the Secretary's regulations constitute an "express

federal law to the contrary" within the meaning of Mescalero Apache Tribe v. Jones.

Because the California Supreme Court held that federal law precludes State regulation of Respondent's conduct, it did not address the second qualification to the general rule established by Mescalero Apache Tribe v. Jones, supra; i.e., that the State regulations must be non-discriminatory. In a fishing rights context, State regulation not only must be necessary for conservation of the species, but also must fairly apportion the conservation burden. See, e.g., Washington v. Fishing Vessels Ass'n., supra; Department of Game v. Puyallup Tribe (Puyallup II), supra; Sohappy v. Smith, 529 F.2d 570 (9th Cir., 1976); United States v. Michigan, 653 F.2d 277 (6th Cir., 1981).

If the California Supreme Court had addressed the discrimination/conservation issue, there are two reasons why it could not have concluded that F. & G. Code §8685.6 is non-discriminatory and necessary to conserve the Chinook salmon of the Klamath River system.

First, and most obvious, Petitioner did not even allege or offer to prove in the trial court that the State laws at issue herein are necessary conservation measures. Thus, as in Arnett v. 5 Gill Nets, supra, the record in this case is completely devoid of any evidence upon which such a finding could have been made.

Second, it is obvious from an examination of Petitioner's salmon fishing laws that the total and permanent ban on sales by Reservation Indians of fish caught in Reservation waters is nothing more than a system by which Petitioner has allocated the entire harvestable (and more) portion of Chinook salmon runs in the Klamath River system to the non-Indian ocean commercial and sport fisheries.

There is no provision in Petitioner's scheme for scientific reevaluation of the ban. F. & G. Code §§8434, 8685.6. Moreover, Petitioner has steadfastly resisted efforts to reduce the offshore troll harvest to protect in-river salmon runs. See, e.g., California Senate Joint Resolution No. 35, Res. Chap. 46, June 1, 1982. A copy of that Resolution is included at pp. A17-19 of the Appendix hereto.

Rather than being "... a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible[,]" Hughes v. Oklahoma, supra, 441 U.S. at 338, Petitioner's salmon regulations are "a choice of the most discriminatory means even though non-discriminatory alternatives would seem likely to fulfill the State's legitimate local purpose more effectively." Id. A regulatory scheme virtually indistinguishable from Petitioner's was found to discriminate against Indians in Department of Game v. Puyallup Tribe, (Puyallup II), supra.

Thus, because there is federal law to the contrary, and because Petitioner's salmon regulations are not necessary for conservation and discriminate against the Indians of the Hoopa Valley Reservation, there is no reason to review the California Supreme Court's holding that Respondent did not lose his immunity to State prosecution when he possessed or sold Reservation-caught salmon beyond Reservation boundaries.

V. P.L.83-280 DOES NOT AUTHORIZE CALIFORNIA TO PROHIBIT INDIANS OF THE HOOPA VALLEY RESERVATION FROM SELLING FISH CAUGHT IN RESERVATION WATERS.

The California Supreme Court rejected Petitioner's contention that P.L. 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360) provides California with jurisdiction to regulate fishing by Indians of the Hoopa Valley Reservation. This same argument was made and rejected in Arnett v. 5 Gill Nets, supra. Petitioner has unsuccessfully made essentially the same argument in several other cases. See., e.g., Santa Rosa Band of Indians v. Kings County, 532, F.2d 655 (9th Cir., (1975), cert. den. 429 U.S. 1038; United States v. Humboldt County, 615 F.2d, 1260 (9th Cir., 1980); Cory v. Campbell, 125 C.A. 3d 1044 (1982), cert. den. 459 U.S. 828.

In Bryan v. Itasca County, 426 U.S. 373 (1976); Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir., (1982), cert. stat. ___ U.S. ___ 103 S. Ct 2091; United States v. Marcyes, 557 F.2d 1361 (9th Cir., 1977), United States v. Farris, 624 F.2d 890 (9th

Cir., 1980), cert. den., 449 U.S. 1111; and Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (11th Cir., 1981), cert. den., 455 U.S. 1020), the courts of the United States have consistently rejected the same contention about State jurisdiction under P.L. 83-280 that Petitioner made in this case. There is no reason why this Court should review yet another rejection of this same argument.

CONCLUSION

The California Supreme Court's decision that the Secretary's regulations preempt Petitioner from prosecuting Respondent in this case is entirely consistent with the prior decisions of this Court, other federal courts and even California's own courts in cases involving federal Indian policies and the nature and extent of reserved fishing rights of Reservation Indians. Moreover, the decision is based upon and supported by the evidence, and is properly limited to the issues actually before the court.

The Petition pervasively and deliberately misstates or mischaracterizes the proceedings below, and relies almost entirely upon purported evidence -- including affidavits never offered or introduced in the trial court and expressly rejected by the Court of Appeal -- which never was and cannot now be made part of the record.

By such means, in reliance upon legal arguments precluded by doctrines of res judicata, collateral estoppel and waiver, and upon grounds repeatedly rejected by this Court and other federal and State courts, Petitioner seeks nothing less than to extinguish the federal right of the Indians of the Hoopa Valley Reservation to fish in the Klamath River, a right which is "not much less necessary to the existence of the Indians than the atmosphere they breathed." Blake v. Arnett, supra, 663 F.2d at 909.

There is no reason in law, fact, logic or justice to deprive the Indians of the Hoopa Valley Reservation of that essential right, and thus the Petition should be denied.

Respectfully submitted,

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